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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CATHI CLEVEN, TARA CLEVEN,) Docket No. A 16-CA-820 RP
ARELI ARELLANO AND JOEL L.)
MARTINEZ, FOR THEMSELVES)
AND OTHERS SIMILARLY SITUATED)
vs.) Austin, Texas
MID-AMERICA APARTMENT)
COMMUNITIES, INC., AS GENERAL)
PARTNER OF MID-AMERICA)
APARTMENTS, LP, MID-AMERICA)
APARTMENTS, LP, INDIVIDUALLY)
AND AS GENERAL PARTNER OF)
CMS/COLONIAL MULTIFAMILY CANYON)
CREEK JV, LP AND CMS/COLONIAL)
MULTIFAMILY CANYON CREEK JV LP) November 2, 2017

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARK P. LANE

APPEARANCES:

| | |
|--------------------|---------------------------------------------------------------------------------------------------------------------------|
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1 **(Appearances Continued:)**

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25 Proceedings reported by electrical digital sound recording,
transcript produced by computer.

1 (Proceedings commence at 9:03 a.m.)

2 THE CLERK: The Court calls the following case for a
3 motion hearing: Cathi Cleven, Et Al vs. Mid-America Apartment
4 Communities, Inc., 16-CV-820.

5 THE COURT: Good morning, everyone.

6 Reminder you're in a magistrate's courtroom. We don't
7 have a court reporter, so it's incumbent upon you to have a
8 microphone pointed towards your face if you want the recording to
9 pick you up.

10 First order of business I'd ask you to do is introduce
11 yourself. Tell me who you are, who you represent, and we'll
12 start over here on my left.

13 MR. WEBER: Thank you, your Honor.

14 Marty Weber here on behalf of the plaintiffs and the
15 putative class, joined by Britt Monts, Jason Snell, Stacey Reese,
16 and Rich Norman. And then, Kevin Jewell, an expert that is the
17 subject of the hearing this morning, is also with us in the
18 courtroom.

19 THE COURT: All right. Well, welcome everyone. Please
20 have a seat. Over here?

21 MR. GOHEEN: Good morning, your Honor.

22 Barry Goheen and Katherine Stein representing the
23 defendants.

24 THE COURT: Okay. Thank you.

25 All right. I've read what you have filed as it relates

1 to this motion to strike business. I've gone back and looked a
2 little bit because I, frankly, hadn't begun to get prepared for
3 our certification hearing when this all blossomed, but I went
4 back and looked at some of that. So I have some sense of what's
5 going on here.

6 I'm going to start over here with the defendants.
7 Here's what -- here's my understanding. Plaintiffs have an
8 obligation to establish class ascertainability, right? The way I
9 understand their argument is, they rely on the Ellsberry
10 deposition where he said this could be done, although he
11 acknowledges he's not an IT expert. They file a motion for class
12 certification. Y'all's response is -- and you're welcome to come
13 up.

14 Y'all's response is something along the lines of it's
15 not ascertainable, it's very difficult, have to go look at
16 individual tenant ledgers. Plaintiffs respond by attaching
17 affidavits from experts saying, oh, that's not so, it can be
18 done. It doesn't have to require individual assessments of
19 ledgers. Forget about the law, forget about everything else,
20 that's the lay of the land. What -- why shouldn't we make some
21 further inquiry into whether or not the software that's available
22 to your clients can produce the information that we need here?

23 MR. GOHEEN: Well, your Honor, I guess to clarify the
24 facts, Mr. Ellsberry never said the class was ascertainable.
25 That's their argument, but that -- he absolutely did not say

1 that. No way -- no. He said I want to make sure that we're
2 clear on the -- step back to the class definition that they
3 proposed. And the operative phrase is -- there is all tenants of
4 the MAA properties who were assessed and paid late rent charges.

5 THE COURT: See, I saw "assessed." I didn't see
6 "paid."

7 MR. GOHEEN: That's in the class definition. I mean, I
8 think they'll admit that. That's in the --

9 MR. WEBER: It is.

10 THE COURT: I was just looking at it this morning. The
11 statute seems to be just if it's assessed. I didn't even see if
12 it was paid. But putting that aside, go ahead.

13 MR. GOHEEN: But that's the important point, the "and
14 paid" part. And we agree and Mr. Ellsberry testified that their
15 IT program could identify those as individuals who had been
16 assessed late fees. What he didn't say and what he actually said
17 could not be done is to identify those individuals who had
18 actually paid those charges, and that's what is necessary under
19 their class definition.

20 And, again, there's not going to be any dispute about
21 that, either. They tried. They tried six or eight times in the
22 deposition to say, well, can this -- and the answer was always
23 no. That's why he sent -- that's why the affidavit was submitted
24 with our class cert response to clarify that yes, and it was
25 admitted in the affidavit, as well.

1 The Yardi program -- and that's the IT program we're
2 talking about -- can actually be programmed -- and we've done
3 that -- to spit out a program that will display those that were
4 assessed, but it will not -- just, you know, it's software
5 limitation, it cannot be engineered due to data limitations to
6 allow the generation of those who paid. So the net charges are
7 not knowable at that level.

8 THE COURT: So let me see if I understand this.
9 Plaintiffs say yes, you can. Y'all say no, you can't. You can't
10 write a program that can produce the names of these people who
11 not only were charged but paid. And I'm going to get a battle of
12 experts, and then, what am I supposed to do?

13 I mean, there's a part of me that says, why don't I
14 order the defendants to provide to the plaintiffs four years'
15 worth of the Yardi data, or at least the apartment complexes that
16 the named plaintiffs are in, and if their expert can write the
17 program within -- if they can -- you know, if I give them 30 days
18 to do it and their expert can write the program, then we know
19 it's doable. And if the plaintiffs' expert can't write the
20 program, then you've been bolstered, if you will. Your argument
21 is a good one.

22 Why isn't that an easy, simple way to determine whether
23 or not that software can generate these names?

24 MR. GOHEEN: Well, the first answer to that is, why
25 wasn't this done months ago? That's why we're here today. It's

1 not to determine what in my -- respectfully submit, that's not
2 why we're here today. We're here today because they untimely
3 disclosed experts. That's the problem. They had an expert.
4 They disclosed an expert on exactly these issues, Otto Wheeler,
5 and guess what, he bombed in his deposition. That's why they had
6 these two people that came in late. That's just the bottom line.
7 They had an expert and we deposed them and he was abso -- he was
8 on the issue of ascertainability, the very issue we're talking
9 about right now, and class member damages. He was on those two
10 issues. But in his deposition, he said, well, to understand the
11 class member damages, that would take a tenant-by-tenant
12 analysis.

13 And, also, with exclusions, which is their other guy,
14 Prutsman, who I think they've kind of disregarded at this point.
15 He's not even part of their argument for -- most part, but class
16 action administrator said, well, for exclusions such as
17 bankruptcies and releases and all that, we can run some sort of
18 national search. Well, they had the expert timely disclosed in
19 June. We followed the scheduling order and they didn't. That's
20 the reason we're here today. Not to argue whether the class is
21 ascertainable. That's been briefed. That's the problem and
22 that's the prejudice to us to have to go depose two more experts
23 that they untimely disclosed because their own expert bombed in
24 his deposition. That's why they should be stricken.

25 This isn't -- you know, respectfully, this is not about

1 whether the class is ascertainable. They're going to have a big
2 dog-and-pony show to argue exactly that point, even though the
3 Court's order said we're not going to have witnesses or arguments
4 on class cert today. That's the reason they should be stricken,
5 your Honor. It's untimely.

6 THE COURT: And I think that is your best point,
7 frankly, and as it relates to this case. But I do wonder
8 sometimes if I go your direction on this and they move to
9 voluntarily dismiss the lawsuit and then, file another one,
10 aren't we right back to where we are right now? Maybe that --
11 unless the defendants have changed the way they assess late fees
12 to in a manner that the plaintiffs find satisfactory or not, I
13 don't know. Whether that shrinks the damages period. Aren't we
14 right back to where we are?

15 MR. GOHEEN: They're not going to -- A, your Honor,
16 they're not going to do that. B, I think there should be
17 conditions on a voluntary dismissal, which is clearly something
18 the Court can do under Rule 41. I mean, so they're not going to
19 -- perceptively speaking, they're not going to voluntarily
20 dismiss a year and a half into the case. But the Fifth Circuit
21 cases, which they don't even hardly respond to in their brief,
22 are exactly on point.

23 Sierra Club, Harmon, Hamburger, Geiserman, all of those
24 were Fifth Circuit cases where there were late expert reports in
25 violation of a scheduling order, the district court excluded

1 them, or maybe didn't, but regardless, each of those cases, the
2 Fifth Circuit said yes, the sanction of exclusion is absolutely
3 appropriate under these circumstances. I mean, that's the law
4 and that's why we're here, not for them to have a diversionary
5 argument on how the class is ascertainable and how their theory
6 of the case and all that sort of stuff.

7 Here's a prediction. They're going to pull up --
8 they're going to put up this PowerPoint in a minute. You're not
9 going to see the name Otto Wheeler on it. That's their expert.
10 That's the one they disclosed. Not Kevin Jewell, who put in a
11 placeholder, and we've cited a case where that's inappropriate in
12 the Fifth Circuit. Not a class action administrator. They've
13 had their chance. They've had their chance, your Honor. They
14 did not come through.

15 Well, they had an expert who just bombed, quite
16 honestly, and that's not the purpose of the expert rules. You
17 can't -- you don't get another chance. This is untimely. It's
18 unfair. It's -- besides the obvious cost, including coming here
19 today if we have to depose them and that's also a significant
20 factor. I mean, the four-factor test of Sierra Club, they make
21 no effort to apply in their papers. None whatsoever. Is there a
22 plausible explanation? No, there's not. They're setting up a
23 red herring with Ellsberry, who never testified that the class
24 was ascertainable. Numerous, yes. Ascertainability, no. Those
25 are two separate things that they're trying to combine, and

1 they're going to do it again in a minute, I guarantee you.

2 So that's not appropriate. Obviously there's
3 prejudice. Curing the prejudice is a sanction. A continuance
4 doesn't incent future compliance with scheduling orders. I mean,
5 it just doesn't. And that's -- again, those are -- that's right
6 out of the Fifth Circuit cases. That's the law. There's just an
7 abundance of authority, including judges in this court we've
8 cited just this year, Yeti and many other cases, again, right on
9 point, late expert reports and they're just stricken.

10 I mean, at the absolute bare minimum, your Honor -- and
11 I know this was not your Honor's. This was the district judge
12 when they wanted to take and they felt they were getting the
13 runaround by prior -- the prior counsel and taking the 30(b)(6),
14 what Judge Pitman did was require that the deposition be taken in
15 Austin, even though Mr. Ellsberry's in Memphis, at their
16 convenience. At the absolute bare minimum, the sanction, if not
17 exclusion, should be them producing in Atlanta at our convenience
18 so the -- to mitigate the cost we've had. I think at a bare
19 minimum, that would be a fair resolution. But the Fifth Circuit
20 would have required these to be stricken, your Honor, in my
21 respectful opinion.

22 THE COURT: You make in my opinion good points, and I'm
23 going to hear from the other side and I'll think about them
24 because I'm not going to rule from the bench today. But let's
25 say I ruled against you. Besides Atlanta, is there an effective

1 way? I mean, I'm a layman as it relates to these software
2 programs and whatnot.

3 MR. GOHEEN: So am I, your Honor.

4 THE COURT: Okay. Well, I think many of us probably
5 are with the exception of maybe Mr. Jewell back there. But, I
6 mean, that's my kind of -- I don't know if you'd be giving up
7 state secrets by giving them, you know, the Yardi software data
8 as it relates to maybe two or three of these complexes, and if
9 they can write the software, then we know it's writable and they
10 can give you the code that they produced.

11 I mean, I'm almost -- I've got the plaintiffs saying
12 that could easily be done. I've got the defendants saying it
13 can't be. But my gut reaction is to say, okay, plaintiff, put up
14 or shut up. You hire the expert, you find out if the code can be
15 written that can give you the information you want.

16 MR. GOHEEN: Well, your Honor, here's the issue with
17 that and this shouldn't be a Daubert hearing or anything like
18 that. But his affidavit was about the worst affidavit I've ever
19 seen. I mean, under his affidavit, all that he said was, well, I
20 called two people who said it could be done. He didn't say it
21 could be done --

22 THE COURT: No. I agree.

23 MR. GOHEEN: -- based on his independent research. All
24 he did was look up the Yardi website, he looked up an independent
25 consultant for Yardi and said, well, here's what the website

1 says. He's a layman, too, in my opinion, no more than I or
2 anyone anything else in the room so --

3 THE COURT: I know it seems like I'm beating up on you,
4 but I'm going to beat up on them here in a minute.

5 MR. GOHEEN: Okay. Thank you, your Honor.

6 THE COURT: I tend to agree with you. All right.
7 Well, I kind of tend to jump into right what interests me. Is
8 there anything else that you wanted to share with me? And I'm
9 not trying to cut -- we've got all morning. So.

10 MR. GOHEEN: No. Yeah, I believe I've made the points.
11 I appreciate your Honor's questions and they're good questions.
12 I'm not trying to minimize their significance.

13 At the same time, we fully believe that this is -- the
14 Sierra Club test is simply not met and this is, again, a red
15 herring to obscure what Mr. Ellsberry did and did not testify to.
16 There are two components of this class definition: Assessed and
17 paid. Assessed, everybody agrees it can be done. We're saying
18 it can be done. Paid, nobody has said -- at least up through our
19 class response, which was our one shot at it, nobody said it
20 could be done.

21 Now they're trying to undo all of that and I believe
22 there's the next issue of fundamental fairness to us. We had our
23 record, we deposed a one timely-disclosed expert that he said
24 what he said, and we relied on that in our class cert response.
25 We just don't believe it's fair to give them a Mulligan and say,

1 well, let's bring in two other people and sweep our first expert
2 who bombed in his deposition under the rug. Just believe that's
3 not compliant with Fifth Circuit law, your Honor. Thank you for
4 your time, though.

5 THE COURT: You're welcome.

6 MR. GOHEEN: Appreciate it.

7 Is it Mr. Weber? Is that it?

8 MR. WEBER: Morning, your Honor.

9 THE COURT: Why isn't he right?

10 MR. WEBER: He's not --

11 THE COURT: I mean, why isn't -- I mean, the reality is
12 Wheeler bombed. We all know he did. Jewell cites other hearsay
13 in the late responses -- or not the late response but the reply
14 brief. I'm sorry, the response. And if the rules mean anything,
15 y'all didn't get it done by the time you needed to get it done.
16 Why isn't that a fair criticism?

17 MR. WEBER: It's not a fair criticism, your Honor,
18 because Rule 26 and Rule 37 permit what's happened here. And if
19 I can address in sort of a sequential fashion how we got to this
20 point. Because a lot happened before Mr. Goheen and his firm
21 joined this case.

22 And, specifically, there were multiple hearings in
23 front of Judge Pitman that postured the case in a specific way,
24 specific information being provided on a specific timeline. And
25 what the defendants argued before Mr. Goheen's firm joined it

1 was, they wanted to provide a certain amount of data on the front
2 end. They didn't contest numerosity. They didn't contest that
3 you could identify specific people. In fact, they told Judge
4 Pitman, we know who these people are and we can find them.

5 For purposes of numerosity, you're not just counting
6 individuals that are walking down the street. You're counting
7 individuals who meet the class definition. And what the prior
8 counsel told Judge Pitman was, we know who those people are and
9 we can tell you, Judge, who those people are. What they said and
10 what they've told Judge Pitman was, we don't want to go through
11 the level of granular data producing that on the front end. It's
12 going to take some time. We can do it, but we don't want to do
13 it now. We're not going to contest numerosity. We represent to
14 the Court that we can identify these people. That's going to be
15 an uncontested issue.

16 That was the fact pattern and those were the documents
17 that were placed in Mr. Wheeler's hands for purposes of his
18 deposition. At his deposition, what he testified to when he said
19 this in his report, as well, he said, my understanding is the
20 parties have agreed with the Court there's going to be additional
21 granular data provided later on. What I can say right now on the
22 basis of the data that I have in front -- and this is uncontested
23 by the defendants because even Mr. Ellsberry says it. If you
24 look to a tenant ledger and a tenant ledger is a summary of
25 information that is maintained in the Yardi database, you can

1 tell what the charges were, you could tell whether they were paid
2 or not, and you could tell if they were waived or not.

3 And so, on that -- the basis of the tenant ledger,
4 which was the scope of information that Mr. Wheeler had it for
5 purposes of his deposition and Mr. Ellsberry testifying in his
6 deposition that you can look to the tenant ledger. We know this
7 information. We know what fees are paid. We know what fees are
8 waived. We know --

9 THE COURT: Tenant ledger as in the manual ledger or
10 the digital ledger?

11 MR. WEBER: It's the digital ledger that pulls up -- if
12 you imagine Yardi as a giant database that maintains all these
13 data points, maintains journal entries for every charge and every
14 payment, that's maintained in the database. The tenant ledger
15 extracts information out of that database and in a summary form
16 for each individual tenant, places that information on their
17 tenant ledger.

18 So, for example -- and I apologize because I want to be
19 able to show the Court this and my computer is -- if you'll just
20 give me just a moment, your Honor.

21 THE COURT: Sure.

22 MR. WEBER: On the tenant ledger, it identifies -- we
23 gave the Court a hardcopy of the presentation, your Honor.

24 THE COURT: Yes.

25 MR. WEBER: I believe that I've given away all the

1 copies.

2 In the tenant ledger, there's a specific slide that
3 talks about Cathi Cleven and it has her tenant ledger. She has a
4 specific identifying code. Every tenant at every apartment
5 complex is assigned a code. That code tracks every journal entry
6 that goes into the database. So when she makes a payment,
7 there's a record that shows she made a payment. When she's
8 charged or assessed a fee, it's -- there's a specific fee
9 assessment that has a journal code that's attached to it.
10 Initially, and in response to Judge Pitman's order, ordering them
11 to provide information, the defendants produced over 8,000 pages
12 worth of spreadsheets that list every charge for a late fee to
13 every tenant at every property.

14 So they gave us already one half of the ledger. They
15 gave us the charge side of the ledger. Corresponding journal
16 entries when you look to the tenant ledger, it has a journal
17 entry. When you look to the massive spreadsheet, you can use the
18 tenant code, find that code, that charge, then you could
19 correspond to every fee that's assessed. That's maintained in
20 the database.

21 What they said and what they represented to Judge
22 Pitman was -- for purposes of prior to the hearing, they did not
23 want -- they did not want to provide the other side of the
24 ledger. They didn't want to go through the process of extracting
25 the payment side of the ledger. Not that it can't be done but

1 that they didn't want to do it at that time. Because if you
2 travel back in time, a few months before Mr. Goheen got here,
3 nobody was contesting ascertainability. They have a record of
4 every charge and a record of every payment. That's all Mr.
5 Jewell is saying.

6 If you give me the opportunity, what Mr. -- I can
7 demonstrate that what Mr. Ellsberry is saying is incorrect.
8 Until the time of the hearing -- excuse me, until the time of
9 their response, they had never taken the position in this
10 litigation that you couldn't find the information. They had
11 taken the position that they didn't want to. So for purposes of
12 -- for purposes of where we were for Mr. Wheeler, he simply said
13 for purposes of ascertainability, I could ascertain the class.
14 And I want to pause here for a second, your Honor, because this
15 is an important issue.

16 Ascertainability is not the bar that the defendants say
17 that it is. Ascertainability does not require that we, in fact,
18 go through the process of having one summary spreadsheet that we
19 can look to. Numerous courts, numerous courts, even courts in
20 which Mr. Goheen has been counsel, have stated that the issue of
21 ascertainability does not require that you have one simple
22 summary spreadsheet. We may have to do some work ultimately. If
23 you had to do a tenant-by-tenant ledger review in order to see
24 what fees were charged, what fees were waived, and what fees were
25 ultimately paid, that provides you the level of information you

1 need to establish ascertainability.

2 Ascertainability is not looking at whether you have to
3 do some work, whether there's some labor involved. Courts are
4 very specific that that's not the bar. The defendants are
5 setting an artificially high bar. They want to say, unless you
6 can cobble all of this information together on one spreadsheet,
7 you can't prove ascertainability. That's simply not the test.
8 Mr. Ellsberry said we can go to the ledger and we can sort this
9 out. Mr. Wheeler said on the basis of the information I have, we
10 can go to the ledger and we can sort this out. We can tell if a
11 tenant paid late fees. We can tell if a tenant didn't pay late
12 fees. That provides the objective proof we need in order to
13 support ascertainability.

14 We could have stopped there, quite frankly. We could
15 have simply said when they brought forward Mr. Ellsberry, who
16 said we can't put together only one spreadsheet to show this
17 information, we could have said in our view, and we did say and
18 we did argue in our reply brief, that it's a false test that
19 they're setting. That what Mr. Ellsberry is saying in this
20 limited point doesn't matter. Even if we can't pull it together
21 in one spreadsheet, we can still establish ascertainability in
22 the case. We can still identify these people.

23 Well, we didn't want to stop there because what Mr.
24 Ellsberry said in his declaration, we believe, is demonstrably
25 false. He's saying Yardi does not have this capability and we've

1 identified people who know Yardi. Mr. Ellsberry said in his
2 deposition, he wasn't an IT expert. We've talked to, identified,
3 worked with IT experts who have done this on a repeated basis,
4 and they say you can write the query.

5 So we brought forward the information for this court
6 that has to conduct its rigorous analysis of all the Rule 23
7 elements and simply said we think -- and we know that we can
8 establish ascertainability, but we want to point this out. What
9 they're saying, even if this artificially high bar is the test,
10 which it isn't, but even if it was, we can still do it.

11 So why should we be permitted to do it and do the rules
12 allow it? The rules do allow it. Rule 26 says that when you
13 have a docket control order that doesn't specify rebuttal expert
14 deadline, you have 30 days. When Mr. Ellsberry stated, even
15 though he wasn't qualified, when he stated that under Yardi,
16 Yardi doesn't have the technical capability to do this, it just
17 can't be done, our clock started ticking, and in less than 30
18 days, we produced a report from an expert who said yes, it can be
19 done. So --

20 THE COURT: Which report is that?

21 MR. WEBER: The Jewell declaration. And in the Jewell
22 declaration, as an expert --

23 THE COURT: But why didn't you get declarations from
24 the two guys that Jewell cites? I mean, they're the experts.
25 Jewell really isn't.

1 MR. WEBER: We're -- for purposes of an expert, an
2 expert is -- and Mr. Jewell has testified as an expert in
3 multiple cases in which identification and calculation of damages
4 was the issue. For example, in the debit fee litigation that Mr.
5 Jewell was involved in, they had to go through thousands and
6 millions of lines of data from banks trying to see who was
7 assessed fees and going through the databases, were assessed
8 fees, who were not assessed fees. He does have the -- he does
9 have the background and experience to provide that information.

10 And, in addition, experts are entitled and allowed to
11 rely on information from outside sources routinely relied on.
12 And people like Mr. Jewell routinely rely on people who have
13 specific database expertise, and that's who he reached out to.
14 Speaking to other people, just as an expert is entitled to do
15 under the rules to rely on other people that they would
16 ordinarily consult with and to obtain the information.

17 And we agree with you, your Honor. We think if they
18 produced 30 days of information, based on the information we
19 have, we can do that. We can write that code. What we're saying
20 now is -- and sort of a very limited fashion for purposes of this
21 hearing, all we're saying now is, what Mr. Ellsberry said in his
22 declaration is false. He says you can't do it, even though he's
23 not an IT expert, he was providing technical information for this
24 court to rely on.

25 So under 702, this court at some point is going to

1 analyze whether Mr. Ellsberry even has the capability of saying
2 it can't be done, whether he's qualified to say it. But under
3 Rule 702, he was proffering to the Court technical expertise
4 about the capabilities of the Yardi database system. We went out
5 and retained an expert to rebut that one limited point of the
6 technical capabilities of Yardi. This court is obligated to
7 conduct the rigorous analysis, and we believe it ought to be done
8 on the facts.

9 And what Mr. Goheen would not acknowledge to the Court
10 is, he's going to do everything in his power to ensure that we
11 don't get the information to demonstrate that our expert is right
12 in his declarants is wrong. And so, for purposes of Rule 26,
13 Rule 26 specifically permits the rebuttal expert. There was no
14 docket control order on rebuttal experts. The rule says the
15 30-day deadline applies, so we meet that test.

16 Alternatively, the Jewell declaration should be
17 permitted under Rule 37, your Honor. Rule 37 says that the
18 motion to strike might be granted unless the failure was
19 substantially justified or is harmless. The four-part test was
20 recently laid out in Betzel vs. State Farm Lloyds, which is a
21 Fifth Circuit 2007 case. The four-part test, the importance of
22 the witness' testimony, this court is going to have to conduct a
23 rigorous analysis of whether we can ascertain people. We believe
24 that that's important testimony.

25 The fourth factor is the explanation for the party's

1 failure to comply with the discovery order. Your Honor, for
2 purposes of what has transpired in this case, everything that led
3 up to us filing our motion for class certification definitively
4 led everyone in litigation to know that we could identify these
5 people. That we could see who was assessed fees and we could see
6 who was paid fees. You can look to the tenant ledger and you can
7 identify that information.

8 They were telling a federal judge that they could
9 identify these people and they could count them. We felt that
10 that was information that we could rely on for purposes of our
11 motion for class certification. When they suddenly changed
12 course in the middle and start saying, we can't identify these
13 people, we only know who we charged, but we don't know who we
14 collected money from, and if you pause just on that notion for a
15 second, that's really the crux of what they're telling you.

16 They say that we could pull together a summary report
17 of charges, but we can't pull together a summary report of who
18 paid us. That's absurd for a billion-dollar company, your Honor,
19 that they only care about charges, but they don't care about
20 revenue? That would be like a lawyer who says, I only care about
21 how many hours I bill, but I don't care about collections. I
22 mean, no lawyer thinks like that. And no multibillion-dollar
23 company that makes its money off revenues thinks like that.
24 They're tracking both sides of that. That's how general ledgers
25 work. It's -- I mean, as long as they're following generally

1 accepted accounting principles and I've got to work from that
2 basic assumption.

3 So they know both sides of that equation. And so, for
4 purposes of what we believed we had in the information that we
5 had, nobody was contesting we could identify these people. Mr.
6 Ellsberry pops up in their response and says, we can tell you who
7 we charged, but we can't tell you who we collected money from.
8 And focusing just laser-focused on that, I believe that's false,
9 and we believed it was necessary for purposes of the record to
10 demonstrate that was false. That's what prompted us to get the
11 Jewell declaration.

12 And our explanation for why we didn't do it before is,
13 until Mr. Jewell said that we can't know who paid us, we just
14 know who we charged, we believed that the record was demonstrable
15 -- was definitively clear on that point. I mean, based on
16 representations to, among other people, Judge Pitman, and we
17 thought and we believed and we've attached that to our class
18 certification. We believe the record is very clear on that
19 point.

20 Most importantly, and I believe this gets to what the
21 Court was talking about earlier for purposes of 30 days and
22 additional information, Betzel vs. State Farm Lloyds clearly said
23 when you're focused on whether we should strike an expert. In
24 that case, the district court had stricken what it believed to be
25 a late designated expert. The Fifth Circuit said we're really

1 looking to the prejudice. The prejudice of can we grant a
2 continuance, can we deal with this if we give people a little
3 extra time to deal with what might otherwise be a designation out
4 of time or a late designation. Fifth Circuit said this: What
5 prejudice remains could have been cured with a continuance.
6 Indeed, we have repeatedly emphasized that a continuance is the
7 preferred means of dealing with a party's attempt to designate a
8 witness out of time.

9 So even if they needed a continuance and they needed --
10 and they believed they need additional time maybe to get somebody
11 to respond to Mr. Jewell, the appropriate approach here would be
12 additional time on both sides. I would say, your Honor, that
13 they've had plenty of time. We designated Mr. Jewell at the end
14 of August. With his designation and with the tendering of his
15 report, responding to Mr. Ellsberry's one statement, one
16 contested statement, we sent over deposition available dates for
17 early September. We didn't hear from Mr. Goheen and his firm on
18 that point until they filed their motion to strike.

19 We had Mr. Jewell set for his deposition yesterday. We
20 thought the class certification hearing was going to be today, so
21 last week, Mr. Goheen asked for the deposition. We made
22 arrangements for Mr. Jewell to be available yesterday.

23 To the extent they believed they need to depose Mr.
24 Jewell in order to be able to make arguments regarding his
25 ability to proffer this testimony, we've given them multiple

1 opportunities. The Court's now continued the class certification
2 hearing for purposes of having this hearing today. That provides
3 additional time. We'll, of course, work with the defendants to
4 present Mr. Jewell.

5 But we believe that the Court's leaning in regard to
6 the easiest way to solve this and, quite frankly, the easiest way
7 to get to the Court, and I think that ought to be everybody's
8 goal here, which is, let's decide this case on what they
9 factually are, not what the plaintiffs think they might be, not
10 what Mr. Ellsberry might assert that they are, but let's decide
11 this on the facts. We absolutely meet ascertainability, anyway,
12 but we believe that this additional information will be helpful
13 to the Court, and we believe the Court's suggestion is a good
14 one.

15 We'll, of course, make accommodations. If they need us
16 to appear somewhere, we'll work with them. We've always wanted
17 to work with defense counsel in this case. We've had a much
18 smoother relationship now that Mr. Goheen's firm has joined. We
19 haven't -- exception of this, I think this has been our first
20 hearing. But we had sort of a turbulent road leading up to Mr.
21 Goheen's firm that led to a bunch of hearings in front of Judge
22 Pitman, as the Court can see from the record.

23 THE COURT: I have a feeling that's what led to this
24 being sent down here. So that's your penalty for that.

25 MR. WEBER: But we believe under Rule 26 and under Rule

1 37, we meet the test.

2 And I do need to address this in regard to the Prutsman
3 declaration. The Prutsman declaration simply speaks to what can
4 a class administrator. If this court certifies the case on
5 contested basis, notice is going to have to go out to every
6 member of this class. The Court is going to order the defendants
7 to produce information as to who's in the class. We can do that
8 cooperatively. We'll work with them, as well.

9 But a class administrator ultimately is going to give a
10 spreadsheet with addresses and send those out to the class
11 members for purposes of notice. Class -- so the capabilities of
12 what a class administrator can do is important. A class
13 administrator maintain databases on bankruptcy filings. They
14 know they can take the class list, they can run it against
15 information in their maintained databases and exclude people who
16 have filed for bankruptcy. I will tell you that even that level
17 -- and I've done class actions for a long time. Even that level
18 of detail is a unique argument that the defendants are making
19 here.

20 What routinely happens and what has even happened in
21 this courtroom in multiple cases and class actions that we've
22 certified over the last year or so in this court, even one
23 against MAA, and in that case, MAA had a class definition and
24 that case involved a class definition that was assessed and paid.
25 It was the exact same language we have here. It dealt with water

1 fees, but not late fees. When ordered by the Court, MAA was able
2 to go out and identify for purposes of the Schilling case those
3 people who were both assessed and paid the fees. So they've done
4 it one time, experience in this courtroom or in this courthouse.

5 But for purposes of what would ordinarily happen,
6 ordinarily you would identify those people that meet the core
7 class definition, and you're not worried about finding those
8 people who meet the exclusions because the class notice goes out
9 and it says you're a remember of the class if you meet the class
10 definition and if you don't fall within one of the exclusions.
11 For example, if you're going to receive a check or you're going
12 to be able to submit a claim form, you're -- you need to look at
13 the exclusions, and that's disclosed in a class notice to the
14 defendant -- or to the class members.

15 So the class members are self-identifying for purposes
16 of the exclusions. The defendant, in conjunction with the
17 plaintiff and working with the class administrator, identifies
18 those people who meet the core class definition, which here would
19 be who lived in apartment complexes and who were assessed and
20 paid the late fees.

21 So for purposes of the assessed and paid language
22 tripping them up in this case, it didn't trip them up in
23 Schilling, and they were able to comply with the Court to produce
24 that information. We think when things get drilled down a little
25 bit in this case, this information is there. Every

1 revenue-generating company maintains both sides of that ledger,
2 your Honor.

3 THE COURT: Okay. Mr. Goheen, I mean no disrespect,
4 but I'm hot up here. So I'm taking this off and if you don't
5 mind.

6 MR. GOHEEN: May it please the Court, I'll try to be
7 brief. There was a lot of misstatements to get to.

8 First of all, it looks like we're going to have to
9 depose four people. So that just adds to the cost the two
10 mouthpieces for Mr. Jewell, which was pretty much admitted. So
11 that kind of just compounds the cost. If it was -- why didn't
12 they move for leave with the reply brief? That, to me, would be
13 the logical thing to do. Just move for leave and then, we tee it
14 up months ago, not just --

15 THE COURT: Well, we did -- my staff and I, we talked
16 about that. That might have been the better way to go about
17 this. But if they had, let's just pretend we're two months ago,
18 three months ago, I still have to make the decision.

19 MR. GOHEEN: Correct. But that would -- we would have
20 the decision two months ago, presumably, and all this delay that
21 they're working into the case would still be unnecessary. So I
22 guess regard you get a little bit of ascertainability.

23 But the standard that goes back to DeBremaecker, which
24 is the leading case from the Fifth Circuit out of Texas in 1970,
25 the class definition must be objectively ascertainable. We agree

1 that the assessed part is objectively ascertainable. Mr.
2 Ellsberry -- and you didn't see anything in their PowerPoint
3 about from his deposition that said, oh, yeah, we can determine
4 who actually paid. He can't -- he never testified to that.
5 They're just making this up. They just --

6 THE COURT: Can I digress for a second?

7 MR. GOHEEN: Absolutely.

8 THE COURT: I'll share with you a concern that I have.

9 Again, I've admitted to you that I'm not -- I'm a
10 layman as it relates to computer stuff. And as you have probably
11 gleaned, I'm a layman when it comes to class certification
12 issues, too. But putting that aside for a second, it just --
13 there's a part of me that just defies common sense that a
14 company, big or small -- but let's face it, this is a big one --
15 that has a software program -- I mean, I've been around software
16 programs in different contexts before I got this job. I'm just
17 -- I just think it would be simple to write this code and if --
18 and maybe not -- "simple" is the wrong word, but they're capable
19 of doing it.

20 I mean, when at the end of the year, when whatever the
21 main company is here, Mid-America is putting together their
22 balance sheet and their income statements and all the other
23 material they have to, aren't they going to have a line item for
24 late fees received as part of their revenue stream?

25 And so, I come at this thinking this is kind of a

1 no-brainer and I find -- I'm a little sympathetic with the
2 plaintiffs' posturing and I need to go back and read all of
3 y'all's hearings before Judge Pitman. I got a sense of it.
4 There was trouble through that time, but everybody was kind of
5 operating under the assumption that it is a no-brainer, that it's
6 quite capable of being done.

7 And now, as I understand your argument -- and, again, I
8 told you I thought it was a fair one -- is I should just --
9 because they didn't follow the rules exactly, even though they
10 contest they say they did, I should not allow them to go into or
11 produce other expert testimony on this point. And I just don't
12 know if that's the right thing to do.

13 MR. GOHEEN: Now, here's why it's a red herring. Why
14 didn't they have a rebuttal report of Wheeler? That was the one
15 person they timely disclosed. Why didn't they have him? And
16 just as I predicted, you didn't hear Otto Wheeler's name one time
17 up here.

18 THE COURT: Well, he did kind of say that Wheeler.

19 MR. GOHEEN: Bombed.

20 THE COURT: He said it was ascertainable, but he was
21 relying a little bit on y'all's rep -- your -- earlier counsel's
22 representations that I think the term y'all used is "granular
23 data" would be produced at a later date.

24 MR. GOHEEN: He didn't actually say that in his
25 deposition. They said that. But he just said it would be a

1 tenant-by-tenant analysis. But regardless, that would be the
2 easiest thing to do. And the next easiest thing to do, why not
3 depose an IT person at MAA? Why use somebody who has absolutely
4 zero experience in Yardi? Because he pretty much admitted it
5 just to call up people and say, well, I guess it could be done
6 because someone that's actually a partner said it could be done.
7 That's crazy. I mean, all that's going to do is guarantee
8 Daubert practice. It's going to delay things further before we
9 even get to class cert. I mean, that's exactly what's going to
10 happen here. I mean, that just is inappropriate.

11 I mean, we should have, I guess, moved to strike him on
12 the, quote, unquote, merits, the term I use loosely, just because
13 it's not an expert report. And I wanted to -- this is what he
14 actually submitted in June with their class motion. He submitted
15 what, in effect, was a placeholder report. He didn't have any
16 opinions, but he did say what he'd been retained to do. I've
17 been retained by counsel for the plaintiffs in Cleven, la, la la,
18 to present expert testimony. I expect to analyze and provide
19 opinions regarding the estimation of damages that defendants,
20 from what I understand from counsel, are presently working to
21 prepare. This is in June.

22 The only notification we received then was that he's
23 going to be on estimation of damages after our expert concludes
24 its work, which is, of course, a merits issue. There was never
25 any hint that he was going to be some sort of expert on

1 ascertainability. That's completely new here, has nothing to do
2 with Mr. Ellsberry, has nothing to do with the deposition. I
3 mean, that's just out of whole cloth in August. That -- they
4 notified the Court in their papers that he's not an expert, he's
5 not going to be an expert on Yardi or IT.

6 They should have just deposed an IT person of MAA if
7 they're that curious about it.

8 THE COURT: But that's a level of expertise that you're
9 demanding. I mean, they're moving forward under the assumption
10 that, as I characterized it, a no-brainer that this is easy,
11 their damages expert, he can do his job because it's simple for
12 the defendants to not only determine who was assessed but who was
13 paid. And now -- and in fairness to them, there was never a red
14 flag that I could see that that was not -- "easily" is probably
15 the wrong term, but capable of being done without too much of a
16 burden until kind of the 11th hour.

17 MR. GOHEEN: I guess I'd respectfully disagree because
18 Mr. Ellsberry testified -- this is in our reply brief. The
19 summary information that allows the assessment did not include
20 waivers or credits. That's where you get to the net. That's the
21 paid. And that, quote, transaction level -- transaction level
22 credits and debits are recorded on individual resident ledgers.

23 We didn't know -- go back to this case. The Clevens
24 and the Arellano, Martinez, the two sets of plaintiffs here, we
25 didn't know all of their nets and, frankly, the plaintiffs

1 didn't, either. If you look at their initial disclosures, they
2 were way off until we actually deposed them. And that's what
3 we're talking about. I mean, if they want to have an action of
4 thousands and thousands of people that you can go to the resident
5 ledgers, that's not a class action. That's thousands and
6 thousands of cases jammed together under the guise of a class
7 action.

8 THE COURT: Because you say on behalf of your clients
9 that that's the only way that information can be obtained.

10 MR. GOHEEN: Well, if that's the way it is, that's it,
11 your Honor. I don't --

12 THE COURT: I know, but why don't -- you're saying
13 plaintiffs should just take defendants' words. That's -- the
14 defendants' word has to be tested, I think, here. If the
15 defendant is right, well, then, you're going to win on
16 ascertainability. But if there's a way to write some code and
17 get this information without too much of a burden, I'm just --
18 I'm not persuaded.

19 All right. Here's what I'd like to do. I've changed
20 my mind. You all grab separate podiums here. You grab that mic,
21 if you don't mind, Mr. Goheen, and, Mr. Weber, you grab that one.
22 All right. We're going to do something here and now I need your
23 help on what we're going to do. Okay.

24 What do y'all propose? I need to enter an order. I'm
25 going to enter an order requiring some discovery on this matter,

1 exchange of expert reports, depositions. I need your help with
2 what I need to say. I need help with timing and as it relates to
3 how this affects your preparations in the spring as you get ready
4 to see Judge Pitman in, I think, June. I'll keep that in the
5 back of my mind, but I need your help on what I need to craft.

6 In other words, what I'm telling you, Mr. Goheen, I
7 respect everything you've said. Frankly, guys, obviously these
8 are two good lawyers here and it makes this job so much easier.

9 MR. WEBER: Thank you, your Honor.

10 THE COURT: I appreciate the tenor of your arguments.
11 And, actually, I was impressed by how much y'all know about your
12 subject matter. But y'all all are capable of flying down right
13 above the crops. I'm flying up here at 40,000 feet, and for me,
14 I'm labored with this thought that this was capable of being
15 ascertained. This information is capable of being obtained and I
16 just can't shake it. And I recognize things could have been done
17 differently, but whatever transpired, frankly, Mr. Goheen, and I
18 jokingly said this a moment ago, it is probably what has led this
19 referral over here to me.

20 And because of that, Judge Pitman's a reasonable man
21 and a reasonable judge. If y'all run up against time problems as
22 relates to your trial, you can file the necessary motions and I
23 think he'll hear you out, particularly understanding that this
24 matter was initially referred to for a motion on the class
25 certification. But now we've had this hick-up and we're going to

1 -- it's going to spend more time.

2 So I'm not really -- I have -- I am optimistic you'll
3 be able to work with your trial date, I guess what I'm telling
4 you, but I want to -- I want to have kind of walk out of here
5 with no disagreement as to what needs to be done. So I'll
6 start --

7 MR. GOHEEN: Can I get my calendar, please, your Honor?
8 If you'll excuse me.

9 THE COURT: Absolutely. Sure.

10 MR. GOHEEN: Thank you, your Honor.

11 MR. MONTS: Judge.

12 THE COURT: Yeah.

13 MR. MONTS: This is Britt Monts.

14 THE COURT: Yeah.

15 MR. MONTS: We have Mr. Jewell in the courtroom. We
16 brought him in case the Court had any questions about these
17 issues, and we could sort of, you know, go back and forth and
18 shuttle. But if the Court would simply like to have him under
19 oath and just ask him what we need, he's obviously more technical
20 than any of us. I would offer that, but obviously only if the
21 Court --

22 THE COURT: Well, my quick sense is, you've already won
23 here this morning. So I don't know if I'd go into that.

24 MR. MONTS: Okay.

25 THE COURT: Again, I'm impressed with the lawyering and

1 that extends, I'm sure, to everybody who's sitting at the tables
2 who I haven't heard from. My guess is, I don't have to be real
3 detailed with this order. You all can work it out, the details.
4 But what do I need to say that will help?

5 MR. GOHEEN: Let me make one statement. I mean,
6 Prutsman just isn't involved in this. That has nothing to do
7 with --

8 THE COURT: He's the bankruptcy guy, right?

9 MR. GOHEEN: Right. And you can't self-identify your
10 way into or out of a class. It's as obvious -- under the law.
11 So I think he should be either ordered stricken or they
12 voluntarily withdraw him. That's -- agreed? I mean, that's he
13 has nothing to do with these issues that Ellsberry testified to.
14 The word "bankruptcy" never appeared in Ellsberry's deposition,
15 or exclusion, or anything else. There's no reason to go to the
16 trouble of deposing him. He just said it was after class
17 certification. We're talking about whether a class should be
18 certified.

19 THE COURT: But if the class is certified, it's one of
20 the exceptions to the class members. Once we certificate the
21 class, I think it will be incumbent upon not your team but on the
22 plaintiffs to run those names against bankruptcy ledgers.

23 MR. WEBER: We can do that.

24 MR. GOHEEN: I agree. Again, that's late. That has
25 nothing to do with Ellsberry. That's the untimely part, your

1 Honor. That's totally late. I get -- I get the whole -- but I
2 get the whole thing with Jewell because that's supposedly
3 rebutting ascertainability. But there's nothing in Ellsberry's
4 deposition that even hinted at any of the issues that Prutsman
5 talks about. That's just not -- that's really not fair.

6 MR. WEBER: It was their response, your Honor, whereby
7 they attacked an exclusion to a class definition. For purposes
8 of determining ascertainability, you're looking at the class
9 definition, which is who meets the class definition. For
10 purposes of an exclusion -- for example, one of our exclusions is
11 those people who were member -- the judge or members of the court
12 staff, never had a case whatsoever where anybody has ever looked
13 and tried to go get a list of who's in the court because the
14 Court knows when you get -- somebody in this court living in an
15 MAA apartment, or whatever, if they got a class notice, they
16 would go, wait a second, this is a case that we're working on. I
17 can't be involved here. I can't get this money because we're
18 administering this case.

19 MR. GOHEEN: But it's late. That's the point. Of
20 course -- I'm not done, respectfully. Of course, the only time
21 we were going to contest ascertainability was in our response.
22 When else are we going to -- they're acting like it's a surprise
23 that we're contesting that you can ascertain the class. That
24 does not give them license to come out with somebody who never
25 had been disclosed in any disclosure before.

1 THE COURT: All right. I'll think about Prutsman. All
2 right. Who else needs to be deposed?

3 MR. GOHEEN: I guess the three people, the Jewell and
4 his two people he relied on in Atlanta.

5 MR. WEBER: And we would like -- as this court
6 suggested, we would like one year worth of data so that when his
7 people are deposed, they can say not only could it hypothetically
8 be done but it's been done.

9 MR. GOHEEN: I disagree, because we need to depose them
10 on their declarations and what they know at the time, and then,
11 the Court can make the decision after that.

12 THE COURT: Who's your IT expert?

13 MR. GOHEEN: We don't have an IT expert that's going
14 to --

15 THE COURT: Who runs the IT outfit for Mid-America?
16 Why don't I order him deposed?

17 MR. GOHEEN: I don't know the name, but if that's the
18 Court's order, we'll certainly comply with it.

19 THE COURT: I just kind of want to get to the bottom of
20 this.

21 MR. GOHEEN: I agree.

22 THE COURT: Is this -- can we do this or not? And
23 we're making a -- I think we're making a lot out of something
24 that we can figure out. I mean, I think collectively, y'all can
25 both go back and find an expert. Yardi, I've heard of Yardi

1 before; it's a common program. Can you just write some code and
2 come up with this? We're making a mountain out of a molehill, I
3 believe.

4 All right. Three depositions. Do you want to depose
5 their IT expert or not? I mean, I --

6 MR. WEBER: I believe it would be useful, but
7 respectfully, I'm not sure -- yes. I want that deposition, but
8 I'm not even sure that their IT expert knows exactly how to --

9 THE COURT: All right. Then I'm not going to do it.
10 All right. Three depositions. What needs to be done in advance
11 of the depositions?

12 MR. WEBER: I would like one year worth of the Yardi
13 database so that we can run queries against it and actually
14 demonstrate --

15 THE COURT: For all 60 properties in Texas? Or how
16 about just the properties that the plaintiffs lived in?

17 MR. MONTS: Your Honor, and I'll -- just because I've
18 talked with the expert. The problem is the Yardi system is a
19 bunch of ones and zeros. It's a database like any other
20 databases. It's just a database, just a trademark, and in order
21 to get this data, you can't carve out part of that data system.
22 You have to have -- you have to be able to log into the system to
23 feed your query into it.

24 So what Mr. Jewell needs is access to the Yardi
25 database. We have a protective order and we have protections for

1 even attorney's eyes only and highly sensitive information. But,
2 again, this is a licensed piece of software that is used widely
3 around the world even. So he needs access to the Yardi system
4 that Mid-America uses.

5 THE COURT: Do we need to do that in advance of the
6 depositions?

7 MR. MONTES: I think it would be helpful. I think -- I
8 just want to know the answer. We feel comfortable that we're
9 right. But, again, I think the Court makes a good point that we
10 need to get to the bottom of this, and I think we would need to
11 do that before we take these depositions so that we have the
12 information.

13 MR. GOHEEN: Then we're not deposing him on his
14 declaration.

15 THE COURT: All right.

16 MR. GOHEEN: He's going to have to put another report
17 in.

18 THE COURT: We'll cross that bridge when y'all fight
19 down the road. I'm not going to do that now either even. So
20 three depositions. Do you want -- any reports have to be
21 exchanged in advance of the depositions? What do we need to do,
22 if anything, there?

23 MR. WEBER: I believe they have the information. And
24 we'll make arrangements --

25 THE COURT: I mean, the other two guys, have they

1 submitted reports, the ones that were cited by Jewell?

2 MR. GOHEEN: No.

3 MR. WEBER: No, because these are people that he
4 reached out to. They're not technically our experts, although
5 we've designated them as people with knowledge of relevant facts.

6 THE COURT: You need something more than Jewell on this
7 point, in my opinion. Jewell's your damages guy. But I don't --
8 even he admits in his declaration he's relying on two other
9 people for the conclusions he reaches.

10 MR. WEBER: Okay. Then we'll identify that person and
11 produce it.

12 THE COURT: But they have to be the two that are named
13 in Jewell's declaration, right?

14 MR. GOHEEN: Agree, your Honor.

15 THE COURT: Not some other person out there. I mean,
16 we're way too late for that. I agree with Mr. Goheen on that.

17 All right. So what do you want from those two -- or
18 all three of them, frankly, in advance of the depositions?

19 MR. GOHEEN: If they -- sorry, your Honor.

20 THE COURT: That mic will pick you up, too.

21 MR. GOHEEN: I'm just leaning as that little -- I'm
22 sorry, your Honor.

23 If they have reports, I guess I would respectfully
24 request that there be a deadline set for at least the two people
25 referenced in Mr. Jewell's report to submit something if they're

1 going to. And whatever that deadline is, you know, November
2 15th, December 1st, whatever it is, I'm not too exercised about
3 that. But I think it would be fair to set a deadline and that
4 gives a target date for everyone to understand that this is what
5 they've got to -- you know, this is something that they're going
6 to submit something, do it by a date certain.

7 THE COURT: Okay. What do you think, Mr. Weber?

8 MR. WEBER: That's fine, your Honor. For purposes of
9 -- I would think at least 30 days to reach out to these people.
10 I mean --

11 THE COURT: Okay.

12 MR. WEBER: And --

13 MR. GOHEEN: That's fine, your Honor.

14 MR. WEBER: -- I guess I want to -- I would make a
15 point, your Honor, you know, we seem to be addressing this issue
16 of ascertainability of can we do this. And I would just
17 reiterate for the Court, as we've briefed not only in our
18 response here but in our motion for class certification briefing
19 repeatedly, this is an artificial test. Even if the answer to
20 this, is you can do this, review of the tenant ledgers is
21 sufficient. And I just want to make that point clear that the
22 cases say over and over and over again and we cite --

23 THE COURT: A manual review of the 27,000 units in
24 Texas for four years?

25 MR. WEBER: It's not 27,000, your Honor, because we

1 already --

2 THE COURT: I think that's what you said in your --

3 MR. WEBER: We already know from the spreadsheets that
4 have been produced, the summary spreadsheets that have been
5 produced, we already know the subset of tenants who were charged
6 the fees. So we're already starting to limit the total pool of
7 all tenants.

8 THE COURT: I'm just curious, what is that? Ballpark?

9 MR. MONTS: Problem is, the late fees are not broken
10 down. In other words, the tenant might have paid three days late
11 so they have an initial fee and then, daily fees. The way their
12 summary, their spreadsheets, which are thousands of pages, they
13 just show -- it's line item for each late fee, like a \$75 initial
14 fee and two \$10 late fees. But it's still only one tenant and
15 one month. So that's three line items, but it's really one
16 month's late fee for one tenant. So we have to compress, it may
17 be 27,000 --

18 THE COURT: Have y'all done that yet?

19 MR. MONTS: Well, we would have to do that digitally.
20 We could take their data and we could run it by tenant number and
21 do it. This is just data searches to do it. They've already
22 stipulated to numerosity. They've admitted there are thousands
23 of members of the class and that it involves millions of dollars.
24 They stipulated to that and Mr. Ellsberry testified to that. So
25 that gets us clearly past, you know, the numerosity issue, which

1 they've stipulated to.

2 MR. WEBER: And the point that I'd like to respond to
3 is -- and Mr. Goheen has used the phrase "red herring" a number
4 of times. It's an absolute red herring. It's absolutely
5 contrary to every case regarding ascertainability with the
6 exception of one that know of out of the Third Circuit. It runs
7 contrary to every one of those cases to say that if you -- that
8 you have to have a one computerized summary spreadsheet to do it,
9 and if you have to look to ledgers or if you have to do some
10 work, even if there are administrative challenges in doing that,
11 that somehow that's not ascertainable.

12 THE COURT: I appreciate that, but it sounds like
13 within the next 60 to 75 days, we're going to resolve or if not
14 resolve, we're going to get a much better picture or
15 understanding of whether or not there is code that can be written
16 that can give us the information that we want easily. If that's
17 not the case, then we have a different issue to talk about, and
18 that is whether or not the manual review of these tenant ledgers
19 is the way to go and I'm not -- I don't have an opinion on that
20 right now.

21 So 30 days from the reports deposition -- I mean, I
22 realize we're now starting in November, we have the holidays.
23 I'm not going to press you guys. When do you want to try to get
24 these done?

25 MR. WEBER: I would look to Mr. Goheen's schedule on

1 that since we're addressing this issue for us.

2 MR. GOHEEN: December -- I guess 30 days is December
3 2nd, I think. So December 2nd, I would ask that because of the
4 holidays and we have three depositions, that we depose -- that we
5 have the depositions taken by January 15th. Is that acceptable
6 to the Court?

7 THE COURT: Oh, yeah. If you said January 31st, I'm
8 okay with that, too.

9 MR. GOHEEN: January 31st, 2019?

10 THE COURT: Yeah.

11 MR. GOHEEN: Nah, just kidding.

12 THE COURT: Now you get me in trouble with Judge
13 Pitman. I'm going to go ahead and say January 31st.

14 MR. GOHEEN: Thank you. I was going to say.

15 THE COURT: 2018, if y'all could get it done
16 beforehand, super.

17 MR. WEBER: Judge.

18 THE COURT: Let Mr. Goheen finish. Go ahead.

19 MR. GOHEEN: I would ask that they be produced in
20 Atlanta, your Honor.

21 THE COURT: Yeah.

22 MR. GOHEEN: I do think that's an acceptable backup.

23 THE COURT: That we'll do, okay.

24 MR. MONTS: I think one of these witnesses is in Dallas
25 and Mr. Jewell is in Austin, but he seems to want to put a W on

1 his column, so we can accommodate that.

2 THE COURT: That was a little stab right there, wasn't
3 it?

4 MR. MONTS: I'm joking.

5 MR. GOHEEN: They made us come to -- they made Mr.
6 Ellsberry come to Austin when he's in Memphis. I thought
7 turnabout's fair play to me, but go ahead, Mr. Monts.

8 MR. MONTS: Well, I think what I wanted to say was in
9 order for Mr. Jewell to be deposed to give useful testimony, I
10 think your idea was well taken about his ability to access the
11 MAA Yardi system under the protective order and do the search for
12 the two properties. We can send out discovery. We have no
13 discovery cutoff. We're well within that. We can send out
14 discovery like now and let the 30 days pass for them to respond
15 and allow him access just for those two properties to see if he
16 can write a query to see if he can extract the data; then when
17 he's deposed by Mr. Goheen, then he's prepared the answer all the
18 questions that this court will want. The problem I see is, if we
19 depose him before he can do that, then we're sort of, again,
20 dancing, you know, in the dark. We can't really --

21 THE COURT: But is Mr. Jewell going to be the man that
22 gives us the testimony that we want here? I mean, again, he
23 cited two other people that were the ones who were --

24 MR. MONTS: Yes. It may be Mr. Vimal Vichhani, the
25 Yardi specialist. I mean, yes, Mr. Jewell is an expert on

1 databases and this is just a particular database. But yes, Mr.
2 -- but Vichhani is -- you know, works on the Yardi systems
3 specifically. May they would both be involved in that. But.

4 THE COURT: You know, it was an idea I had, but Mr.
5 Goheen doesn't want to do that right now and I'm not going to
6 make him do it. So.

7 MR. GOHEEN: I pulled this up, your Honor, because I've
8 got the scheduling order and I want to make sure. Their -- so it
9 says, all parties asserting claims for relief shall file their
10 designation of testifying experts and serve on all parties, blah,
11 blah, required by 26(a)(2)(B) by January 15th. And then, the
12 response or rebuttal experts by February 16th. And I guess I'm
13 -- I'm thinking out loud, which is a dangerous thing for me, but
14 should we think about adjusting those dates now or -- I don't
15 know. I'm throwing that open to plaintiffs' counsel and the
16 Court. You know.

17 MR. WEBER: I think given where we are, there's going
18 to be have to be a reasonable modification of the scheduling
19 order. And I would agree that we work with Mr. Goheen to come
20 back to the Court with some suggestions.

21 THE COURT: Yeah. No. I appreciate your pointing that
22 out. It's a really good point.

23 Things are probably going to be moving. Here's what's
24 going to happen. Y'all are going to do these depositions by the
25 end of January. I'm going to allow you to supplement the motions

1 for class certification and responses. Now we're into -- that
2 will put us into February and now we're into March. We're going
3 to be banging up against your other dates. I'll talk to Judge
4 Pitman. And at some point, we'll probably all get together again
5 on that motion for class certification, and at that time, we'll
6 address the future.

7 Does that seem reasonable?

8 MR. GOHEEN: Yes, your Honor. Thank you.

9 And your Honor raised a point I guess I did also want
10 to make, and that's what do we call it, sur-replies or
11 supplemental submissions, I don't -- I think it's necessary as
12 your Honor just pointed out. But, again, I don't have
13 necessarily an idea about when and how that should proceed, but
14 thought it might be good that we work that out while we're here.

15 THE COURT: Yeah. No. I think you're right. All
16 right.

17 Let's require the plaintiffs to supplement by
18 mid-February. I mean, after y'all take this testimony, I assume
19 I'm going to get something that says here's what these people
20 said.

21 MR. WEBER: Yeah. I think early February.

22 THE COURT: All right. February 8th. If you'll file
23 your supplement, and then, a week later, can you file your
24 response?

25 MR. GOHEEN: Yes, your Honor.

1 THE COURT: Okay.

2 MR. WEBER: Just so I understand it, are we -- even by
3 February 8th, are we still not going to have -- I mean, we have
4 -- I want to roll back.

5 We tendered multiple requests for production asking for
6 all of this information. I mean, that was the fight in front of
7 Judge Pitman that they had to turn over all this database stuff.
8 They had to give us all of this.

9 THE COURT: What did he order?

10 MR. WEBER: That was back in the spring. We went to
11 him and the defendants squawked and said, until class
12 certification, don't make us turn over all of this. And we said,
13 what do you propose? And they said, we'll give you summaries.
14 We won't contest numerosity. We can identify these people. And
15 now I feel like, again, we're being asked to fight in a dark
16 room. Mr. Jewell and our folks aren't going to get discovery.

17 And the only reason we got here, Judge, the only reason
18 we got here is they didn't contest this. And if by February 8th,
19 I'm still having to submit things to the Court and I still am
20 locked out and I don't get access to the database and I don't get
21 to run my queries and I don't get to demonstrate for this court
22 that this is easy and it's not impossible, then I'm still
23 fighting.

24 THE COURT: Yeah, but if your experts are as good as I
25 hope you think they are, they should be able to handle a

1 withering cross-examination at a deposition and be able to stand
2 for the proposition that this is ascertainable, and then, you're
3 in good shape. My other response to that is, if your class is
4 certified, I'm going to order them to give you what you want.
5 Now, is your June trial date going to happen? Maybe, maybe not.
6 That's Judge Pitman's call. If I was guessing, I'd say no.

7 So we're going to get there and if you've got the case
8 you think you do, it's just the damages are going up the longer
9 this goes on. So I hear you. I know you're frustrated, but it's
10 one of the -- it's just one of the down sides, frankly, of
11 kicking things over here to the magistrate side. It just slows
12 things down a little bit.

13 MR. WEBER: I'm not worried about the slowness, your
14 Honor. I'm just worried -- it troubles me that we, I believe,
15 justifiably relied on what the defendants said in working and
16 accommodation in regard to discovery requests in front of Judge
17 Pitman. And now I feel like we're getting stabbed because we
18 reached an agreement with defendants -- not this counsel, prior
19 counsel -- that we reached agreements with defendants and I'm not
20 getting the information.

21 Only reason I don't have that database now, the only
22 reason I don't have it and Mr. Jewell hasn't already run that and
23 I'm not handing you reports to demonstrate that Mr. Ellsberry is
24 incorrect in what he says, the only reason that's not happening
25 is because we agreed that this was a nonissue back in the spring.

1 But I understand the Court's admonition. I appreciate
2 what the Court's done today. And we will make a timely
3 supplemental response by February 8th, your Honor.

4 THE COURT: Okay. Mr. Goheen, do you have the need to
5 designate an expert in opposition to this?

6 MR. GOHEEN: That's a good point, your Honor. Sorry.

7 I guess I would at least want to --

8 THE COURT: I'll leave it open then.

9 MR. GOHEEN: Leave it open.

10 THE COURT: You need to file a report within the 30
11 days, as well, if you're going to do -- and designate somebody.

12 MR. GOHEEN: Understood, your Honor. I understand.

13 THE COURT: Okay.

14 MR. GOHEEN: And thank you, your Honor.

15 THE COURT: Sure. Well, it feels like a typical
16 hearing. I think everybody's walking out of here feeling like
17 they didn't get what they -- exactly what they wanted. I don't
18 know if I did anything right or wrong.

19 But the bottom line is, I think we're going to get a
20 lot closer down the road to whether there is ascertainable. I
21 appreciate, Mr. Weber, your thought that it would be nice if you
22 could get the database now and -- because I think you're right.
23 If you had the database, we could figure this out real quick.
24 But if your experts have familiarity with Yardi with other
25 businesses, maybe it's not late fees, maybe it's some other

1 credit against cost of goods sold, or whatever that may be,
2 that's going to be persuasive to me. If they have analogous
3 experience with Yardi as it relates to the ability to glean
4 credits, waivers, those type of things, that's going to be
5 persuasive, okay?

6 All right, everyone. Hold on a second. Okay,
7 everyone. Thank you.

8 MR. GOHEEN: Thank you, your Honor.

9 (Proceedings conclude at 10:10 a.m.)

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11
12
13 REPORTER'S CERTIFICATE

14
15 I, LILY I. REZNIK, DO HEREBY CERTIFY THAT THE FOREGOING WAS
16 TRANSCRIBED FROM AN ELECTRONIC RECORDING MADE AT THE TIME OF THE
17 AFORESAID PROCEEDINGS AND IS A CORRECT TRANSCRIPT, TO THE BEST OF
18 MY ABILITY, MADE FROM THE PROCEEDINGS IN THE ABOVE-ENTITLED
19 MATTER, AND THAT THE TRANSCRIPT FEES AND FORMAT COMPLY WITH THOSE
20 PRESCRIBED BY THE COURT AND JUDICIAL CONFERENCE OF THE UNITED
21 STATES.

22
23 /s/Lily I. Reznik

February 1, 2018

24 LILY I. REZNIK

DATE